PATTI GOLDMAN (WSB #24426)
AMY WILLIAMS-DERRY (WSB #28711)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 *[FAX]*
pgoldman@earthjustice.org
awilliams-derry@earthjustice.org

Attorneys for Plaintiffs

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION; NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES; NATIONAL WILDLIFE FEDERATION; DEFENDERS OF WILDLIFE; NATURAL RESOURCES DEFENSE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; INSTITUTE FOR FISHERIES RESOURCES; and HELPING OUR PENINSULA'S ENVIRONMENT, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES DEPARTMENT OF FISH AND WILDLIFE SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; and NATIONAL MARINE FISHERIES SERVICE, Defendants,	Civ. No. C04-1998C REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL COMPLETION OF THE ADMINISTRATIVE RECORD NOTE ON MOTION CALENDAR May 13, 2005

and

CROPLIFE AMERICA, WASHINGTON FRIENDS OF FARMS AND FORESTS, WASHINGTON STATE POTATO COMMISSION, NATIONAL POTATO COUNCIL, WASHINGTON STATE FARM BUREAU, IDAHO FARM BUREAU FEDERATION OF WHEAT GROWERS, WASHINGTON GOLF COURSE SUPERINTENDENTS ASSOCIATION, HOP GROWERS OF WASHINGTON, AND WASHINGTON STATE HORTICULTURAL ASSOCIATION,

Defendant-Intervenors.

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Defendants Fish and Wildlife Service and National Marine Fisheries Service (the "Services") oppose this motion to complete the administrative record on the ground that no internal agency deliberations need be included in the record. This absolutist position cannot be reconciled with the Services' findings on which the challenged regulation is based, the process that led to adoption of that regulation, the claims made in this case, and the case law establishing the parameters of administrative records.

A. The Internal Review of EPA's Risk Assessments is Relevant to the Claim That the Services' Findings Run Counter to the Evidence Before the Agencies.

The Services embrace two absolute propositions: (1) that judicial review of an agency action must be based solely on the agency's stated rationale; and (2) that internal agency materials need never be included in an administrative record. Neither absolute proposition is true.

Some challenges to agency action, such as the claim presented here that the Services exceeded their statutory authority in adopting the self-consultation regulation, can be decided within the four corners of the challenged decision. However, other challenges call for a more comprehensive record that embodies the full decisionmaking process and evidentiary record before the agency. Under the Administrative Procedure Act ("APA"), an agency action is arbitrary and capricious "if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference of view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). A court cannot decide these types of challenges without a record that goes beyond the stated decision, and the Services cite no case that has upheld an agency's exclusion of all

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(206) 343-7340

deliberative material from the record in such a case.[1]

Here, plaintiffs Washington Toxics Coalition et al. ("Toxics Coalition") claim that the self-consultation regulation runs counter to the best available science and is based on findings that are contrary to the evidence before the agencies. Complaint ¶¶ 108, 117, 133. As explained in the Toxics Coalition's motion, the Services have long been critical of EPA's regulation of pesticides, both because EPA's risk assessments have failed to consider peer-reviewed scientific literature and the full impacts of pesticide use on fish and wildlife, and because EPA has failed to implement the results of past ESA consultations on pesticides. See Motion at 3-4. The agencies purported to address the first criticism by undertaking an interagency scientific review of EPA's risk assessment process. This process eventually led EPA to commit to make some improvements in the way it conducts risk assessments. Based on EPA's description of the process it plans to implement in the future, the Services made numerous findings in the final rule

[1] The Services cite cases that refused to require additional material to be added to a record that the court deemed adequate for judicial review, but these cases do not declare internal deliberations off limits in APA cases. See, e.g., Ad Hoc Metals Coalition v. Whitman, 227 F. Supp.2d 134, 138-39, 142 (D.D.C. 2002) (requiring supplementation of record with some contrary evidence in agency's possession, but refusing to require supplementation with other records when strikingly similar materials were in record); Seattle Audubon Soc'y v. Lyons, 871, F. Supp. 1291, 1308 (W.D. Wash. 1994), aff'd, 80 F.3d 1401 (9th Cir. 1996) (after allowing discovery to complete the record, which contained extensive internal deliberative material, court found record sufficient for judicial review). In arguing that review should be limited to the stated decision, the Services rely on cases like San Luis Obispo Mother for Peace v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1323-24 (D.C. Cir. 1984), which held that administrative records need not include transcripts of the deliberations of multi-headed agencies. Opp. at 4-5. Exposing such commission deliberations would be akin to taking a deposition to explore the mental processes of an agency head, which is generally foreclosed where the agency provided a formal explanation for its decision. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). These cases do not make the give-and-take among agency staff off-limits. Moreover, the fact that the substantial evidence standard applied in American Tunaboat Ass'n v. Baldridge, 738 F.2d 1013, 1016 (9th Cir. 1984), is of no matter since the court stated that a decision supported by substantial evidence could still, based on contrary evidence in the record, be arbitrary or capricious, the standard that applies equally here.

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Seattle, WA 98104
(206) 343-7340

that EPA will be able to credibly engage in self-consultation using its new risk assessment process. 69 Fed. Reg. 47,732, 47,735, 47,741-42, 47,744, 47,746-47 (Aug. 5, 2004). Accordingly, the final rule states: (at 47,737.)

> The Services have carefully reviewed EPA's assessment methodologies and believe that when EPA follows its established approach to ecological risk assessment for pesticides EPA will correctly make determinations as to when a pesticide is or is not likely to adversely affect listed species or critical habitat.

The Services do not dispute that their approval of EPA's promised risk assessment changes formed an essential predicate for the regulation. Accordingly, they included in their administrative record the document embodying EPA's description of its new risk assessment process, and the Services' final statements endorsing that process. AR Disk 1, Docs. 28-29.

During the inter-agency technical review, however, agency scientists offered detailed critiques of EPA's risk assessment methods as being insufficiently protective under the ESA. Plaintiffs have submitted some such critiques (obtained under Washington's Public Records Act), which reveal that the Services continued to raise concerns that EPA lacked studies on particular species and ignored potentially significant impacts due, for example, to sublethal effects, inert ingredients, and pesticide mixtures. See Motion at 3-4 (citing critiques). EPA's new risk assessment process does not cure all of these defects. Instead, the Services have settled for a system in which EPA will use its "best professional judgment" and explain the choices it makes in the face of incomplete information on the pesticides' impacts to species. See Complaint ¶¶ 108, 117. The Toxics Coalition challenges the regulation, in part because the Services' rationale for weakening their oversight "runs counter to the best science, the record before the agency, and the conclusions reached by the Services both in the rulemaking process and previously in evaluations of EPA ecological risk assessments of pesticides." Id. ¶ 133. In order for the Court to review this challenge to the Services' findings as running counter to the

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

evidence before the agency, the record must contain the contrary evidence that was before the agency, including the full inter-agency risk assessment review and uncensored internal dissent.

Despite the evidentiary nature of this claim, the Services have excluded from the record the substantial scientific controversy surrounding EPA's risk assessments, and scientific evidence contradicting the Services' final endorsement of the promised, new version of those assessments. In their view, the Services' past conclusions that EPA's risk assessments were flawed "are not a relevant measure of EPA's ability to produce adequate effects determinations" because the Services stated as much in the final rule. Opposition at 10, quoting 69 Fed. Reg. at 47,752. Moreover, the Services take the position that such flaws should be discounted because EPA has agreed to change its ways, even though the new system was not yet in place and had never been applied by EPA when the Services adopted the self-consultation rule. Id.

The Services' argument would foreclose an APA claim that challenges an agency finding for running contrary to the evidence before the agency. In the Services' view, if it finds scientific critiques irrelevant, and that a new, untested system will cure past problems, its findings make the scientific critiques and evidence of past problems irrelevant in a subsequent legal challenge to the findings. This position is untenable in an APA case challenging agency findings and actions for running counter to the evidence before the agency. Accordingly, the full inter-agency review of EPA's risk assessment process, and the internal assessments of flaws and inadequacies in EPA's risk assessments must be included in the record.[2]

[2] The Services' focus on pre-rulemaking critiques of EPA's risk assessments is a sideshow. First, contrary to the Services' contrary assertion at 9, plaintiffs did submit such prior critiques with their public comments. See Motion at 4. Second, the Toxics Coalition does not contend that the record must contain such critiques beyond those they submitted with their public comments. Instead, they pointed to the public documents containing the Services' pre-rulemaking critiques as illustrative of the criticisms raised in the internal review associated with this rulemaking that the Services have held back from the Court. The Services' logic is entirely

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

It is well settled in the APA that review must "be based on the full administrative record that was before the Secretary at the time he made his decision." Overton Park, 401 U.S. at 420. The Ninth Circuit has stated that "[t]he 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decisionmakers and includes evidence contrary to the agency's position." Thompson v. Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (citations omitted); see Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir. 1993) (citations omitted) (record must include "everything that was before the agency pertaining to the merits of the decision."). This standard applies equally to rulemaking and other APA challenges. Thus, in a challenge to regulation in Walter O Boswell Memorial Hosp. v. Heckler, 749 F. 2d 788, 792 (D.C. Cir. 1984), the court observed:

> If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.. . . To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of the "whole record."

The fact that the designated decisionmaker may not have reviewed contrary evidence is no license to excise that evidence from the record. If such evidence was before the agency, as it was here through the internal scientific review, it cannot be withheld from the Court simply because the designated decisionmaker chose to remain ignorant of internal dissent and contrary science.

B. Internal Scientific Dissent is Relevant to the Claim that the Services Failed to Disclose the Regulation's Full Effects in its Environmental Assessment.

The Coalition challenges the Services' environmental assessment for failing to assess viable alternatives and failing to disclose the regulation's full impacts, as required by the

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circular when they fault the Coalition for not including in their public comments contrary evidence that emerged in the agencies' internal scientific review that has not been made public. Opp. at 11. Moreover, the Services' references (at 5) to the Freedom of Information Act ("FOIA") are inapt since the deliberative process privilege is a qualified privilege that can be overcome by a litigation need for the records in an APA case. See Motion at 8 n.2.

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705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

National Environmental Policy Act ("NEPA"). Internal agency dissent from the regulation is relevant to this claim. The Ninth Circuit has repeatedly confirmed that NEPA requires agencies to disclose scientific controversy in NEPA documentation for the action. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998); Center for Biological Diversity v. Forest Serv., 349 F.3d 1157, 1169 (9th Cir. 2003). Moreover, the Coalition argues that the Services should have prepared a full environmental impact statement in light of the heightened controversy and scientific uncertainties underlying the rule. Complaint ¶¶ 148-51. The Services cannot exclude from the record internal dialogue that substantiates the need for greater NEPA disclosure and analysis.[3]

C. The Record Should Include Communications With Other Agencies and Industry, As Well As Materials Compiled by EPA When It Oversaw the Rulemaking.

As explained in the Coalition's Motion at 5, the record indicates that the Services held meetings and had communications with industry representatives and with other agencies, including EPA and the Council on Environmental Quality, that are not fully documented in the record. The Services provide no justification for excluding these contacts from the record.

In addition, because EPA oversaw the early stages of this rulemaking, its rulemaking records should be part of the record. See 68 Fed. Reg. 3786 (Jan. 24, 2003) (EPA lead role). Apart from documents generated in the course of overseeing the rulemaking, the Coalition is not asking that other internal EPA records be added to the record.

[3]The agencies have submitted more comprehensive administrative records in a similar challenge to the national fire plan self-consultation rule. Those records include comments from regional Fish and Wildlife Service officials and staff raising concerns about the rule's impacts on species' protection, disagreeing that the action agencies will make effects determination that are as effective as the current procedure, and identifying alternative ways to achieve the stated goals. See Summary Judgment Brief at 23-25, 30, 33, 50, 53-56, 59-60, in Defenders of Wildlife v. Norton, Civ. No. 04-1230 (GK) (D.D.C. filed May 3, 2005) (attached) (arguing based on record that agencies failed: to substantiate need for rule, to explore viable alternatives in EIS, and to address public controversy and scientific uncertainty in EIS).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

CONCLUSION

The Court should compel the Services to produce a complete administrative record.

Respectfully submitted this 9th day of May 2005.

/s/ Patti Godman
PATTI GOLDMAN (WSB #24426)
AMY WILLIAMS-DERRY (WSB #28711)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 *[FAX]*
pgoldman@earthjustice.org
awilliams-derry@earthjustice.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On May 9, 2005, I served a true and correct copy of the following documents on the parties listed below:

1.Reply in Support of Plaintiffs' Motion to Compel Completion of the Administrative Record and attachment.

Jean E. Williams, Section Chief
Seth M. Barsky, Assistant Chief
James A Maysonett, Trial Attorney
US Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Benjamin Franklin Station PO Box 7369
Washington DC 20044-7369
(202) 305-0216 *(Phone)*
(202) 305-0275 *(Fax)*
james.a.maysonett@usdoj.gov
Attorneys for Federal Defendants

☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☐ via hand delivery
☒ via electronic service by Clerk

J. Michael Klise
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2629 *(Phone)*
(202) 628-5116 *(Fax)*
jmklise@crowell.com

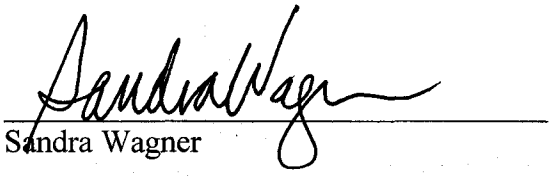
☐ via facsimile
☐ via overnight courier
☐ via first-class U.S. mail
☐ via hand delivery
☒ via electronic service by Clerk

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

J. J. Leary, Jr. Leary Franke Droppert 1500 – 4th Avenue, Suite 600 Seattle, WA 98101 (206) 343-8835 *(Phone)* (206) 343-8895 *(Fax)* jjleary@lfdlaw.com *Attorneys for Defendant-Intervenor*	☐ via facsimile ☐ via overnight courier ☐ via first-class U.S. mail ☐ via hand delivery ☒ via electronic service by Clerk
Russell C. Brooks Pacific Legal Foundation 10940 NE 33rd Place, Suite 109 Bellevue, WA 98004 (425) 576-0484 *(Phone)* (425) 576-9565 *Fax)* rb@pacificlegal.org *Attorneys for Defendant-Intervenors*	☐ via facsimile ☐ via overnight courier ☐ via first-class U.S. mail ☐ via hand delivery ☒ via electronic service by Clerk

I, Sandra Wagner, declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of May, 2005, at Seattle, Washington.



Sandra Wagner

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340